STATE OF MICHIGAN

COURT OF APPEALS

CHERYL LYNN GORSHE, Individually and as Next Friend for MICHAEL W. GORSHE, DAVID T. GORSHE and TIMOTHY A. GORSHE, Minors, and DOUGLAS M. GORSHE,

Plaintiffs-Appellants,

v

DAVID LYNN KENT, SUSAN SCHULTE, AUTOMOBILE CLUB INSURANCE ASSOCIATION and DETROIT EDISON,

Defendants-Appellees,

and

KELLER & AVADENKA, P.C., and ANN MARIE PERVAN,

Defendants.

UNPUBLISHED
October 13, 2000

No. 213184
Macomb Circuit Court
LC No. 95-002182-NI

Before: Fitzgerald, P.J., and Holbrook, Jr., and McDonald, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order dismissing defendants Ann Marie Pervan and Keller & Avadenka, P.C.'s, cross-claim against defendants Susan Schulte and Automobile Club Insurance Association (ACIA). Plaintiffs raise an issue pertaining to earlier orders granting summary disposition in favor of defendants David Lynn Kent, Schulte, and ACIA, and defendant Detroit Edison. We affirm.

On May 19, 1992, plaintiff Cheryl Gorshe and her minor son Michael were injured when the vehicle she was driving was struck by a vehicle owned and driven by defendant Kent. Kent was driving his vehicle during the course of his employment with defendant Detroit Edison. Kent was insured under a no-fault automobile insurance policy issued by ACIA. Defendant Schulte was the ACIA claims adjuster who handled plaintiffs' claim. Subsequently, plaintiffs retained defendant Pervan to pursue a

claim for personal injuries against Kent. Eventually, the case was settled for $19,000.00. Plaintiffs then executed a release, which reads in pertinent part:

> In Consideration of Nineteen Thousand and No/100 Dollars ($19,000.00), . . . I release David Lynn Kent, . . . and all persons or organizations responsible for his acts from all claims and causes of action for all injuries, losses, and damages sustained by me, arising from an incident, all or part of which occurred on or about [May 19, 1992] . . . .

Next, plaintiffs filed the nine count complaint that underlies this appeal. After having found the above release valid, the trial court summarily dismissed seven of the nine counts. The only remaining counts—a no-fault claim on behalf of plaintiff's minor son, Michael, and a claim for legal malpractice against Pervan and defendant Keller & Avadenka, P.C.—were eventually settled by the parties.

Plaintiffs' sole argument on appeal is that the trial court erred by finding that the previously executed release was valid and not subject to rescission. We disagree. This Court reviews decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

"To be valid, a release must be fairly and knowingly made. A release is not fairly made and invalid if . . . the nature of the instrument was misrepresented, or . . . there was other fraudulent or overreaching conduct." Plaintiffs assert that the release was invalid due to the alleged silent fraud of Schulte. In order to establish a claim of silent fraud, a plaintiff must show that the defendant suppressed or failed to disclose a material fact, which the defendant was under a duty to disclose. *M & D, Inc v McConkey*, 231 Mich App 22, 28-29; 585 NW2d 33 (1998). Unless such a duty can be established, silence does not constitute actionable fraud. *Id.* at 29.

Plaintiffs assert that Schulte should have informed them that Detroit Edison was an unnamed insured under the ACIA policy and that there was the possibility of excess coverage under a separate insurance policy. Plaintiffs argue that Schulte's duty to disclose this information arose from the following statutory provision:

> No insurer, or any officer, director, agent, or solicitor thereof shall issue, circulate or use or cause or permit to be issued, circulated or used, any written or oral statement or circular misrepresenting the terms of any policy issued or to be issued by such an insurer, or misrepresenting the benefits or privileges promised under any such policy, or estimating the further dividends payable under any such policy. [MCL 500.2064(1); MSA 24.12064 (1).]

We find no merit in plaintiffs' argument. The plain language of § 2064 indicates that the duty imposed on the insurer only encompasses an insurance policy issued by the insurer. See *Brown v JoJo-Ab, Inc,* 191 Mich App 208, 212; 477 NW2d 121 (1991). The excess insurance coverage at issue was not through ACIA, but through Detroit Edison's insurer, Travelers Insurance Company. Accordingly, Schulte, as agent for ACIA, was under no duty to discuss the terms or even the existence of the Travelers' policy (assuming Schulte had knowledge of either).

Further, there is no evidence indicating that Schulte ever misrepresented who was insured under the policy. Indeed, the record shows that plaintiffs never inquired as to who would have been insured under the ACIA policy. The correspondence that was passed between plaintiffs (via Pervan) and Schulte clearly indicates that plaintiffs were seeking information about the extent of Kent's liability coverage under the ACIA policy. There is no dispute that Schulte's response to that inquiry was accurate. Accordingly, Schulte's silence on whether Detroit Edison was an unnamed insured under the ACIA policy does not constitute actionable fraud. *McConkey, supra* at 29.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Gary R. McDonald